

EPA's New DBE Rule and How It Affects Companies Bidding on SRF Financed Projects

The Environmental Protection Agency's (EPA) new Disadvantaged Business Enterprise (DBE) rule became effective on May 27, 2008. The new DBE rule sets forth an EPA program that serves the compelling government interest of remedying past and current racial discrimination through agency-wide procurement objectives. The new DBE rule revises and replaces EPA's Minority and Women Business Enterprise (MBE/WBE) Program. Because the State Revolving Fund (SRF) Loan Program funding is provided by EPA, the new DBE rule requirements apply to all SRF funded projects.

The implementation of the new DBE Rule (40 CFR Parts 30, 31, 33, 35, and 40) adds additional contract administration requirements to an SRF loan recipient. This document summarizes those requirements.

Note that the SRF loan recipient is not a passive conduit of the contractor's DBE information. By submitting the proposed contractor's DBE documentation to the SRF Loan Program for review, the loan recipient is asserting that it has found the proposed contractor's documentation of good faith efforts adequate.

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1. Each procurement contract signed by an SRF loan participant must include the following term and condition:
"The contractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor shall carry out applicable requirements of 40 CFR part 33 in the award and administration of contracts awarded under EPA financial assistance agreements. Failure by the contractor to carry out these requirements is a material breach of this contract which may result in the termination of this contract." (*Appendix A to Part 33—Term and Condition*)
 2. All SRF loan recipients will be required by EPA to create and maintain a "Bidders List".
 - a. This list must include all firms that bid on prime contracts, or bid or quote on subcontracts under EPA assisted projects, including both MBE/WBEs and non-MBE/WBEs. A Bidder's List form can be found at www.srf.in.gov.
 - b. This list must be kept until the project period for the identified loan has ended. The project period is defined as the timeframe that the loan participant receives SRF funding.
 - c. The following information must be obtained from all prime and subcontractors:
 - (1) Entity's name with point of contact.
 - (2) Entity's mailing address, telephone number, and email address
 - (3) The procurement on which the entity bid or quoted, and when, and;
 - (4) Entity's status as an MBE/WBE or non-MBE/WBE
 - d. The SRF loan recipient must send a copy of the Bidder's List to SRF.
 3. Following are the new Contract Administration Provisions:

- a. A loan recipient must require its prime contractor to pay its subcontractor for satisfactory performance no more than 30 days from the prime contractor's receipt of payment from the loan recipient.
- b. A loan recipient must be notified in writing by its prime contractor prior to any termination of a DBE subcontractor for convenience by the prime contractor.
- c. If a DBE subcontractor fails to complete work under the subcontract for any reason, the loan recipient must require the prime contractor to employ the Six Good Faith Efforts (described below) if soliciting a replacement subcontractor.
- d. A loan recipient must require its prime contractor to employ the Six Good Faith Efforts even if the prime contractor has achieved its fair share objectives.

Six Good Faith Efforts

1. Use the services and assistance, as appropriate, of such organizations as the U.S. Small Business Administration and the Office of Minority Business Enterprise of the U.S. Department of Commerce in the solicitation and utilization of small businesses, minority-owned firms, and women's businesses.
 2. Include qualified small and minority and women's businesses on solicitation lists.
 3. Ensure that small and minority and women's businesses are solicited whenever they are potential sources of products or services to be bid.
 4. Divide total requirements, when economically feasible, into small tasks or quantities to permit maximum participation by small and minority and women's business (i.e., provide alternative bidding scenarios).
 5. Establish delivery schedules, where the requirements of the work permit, which will encourage participation by small and minority and women's businesses (i.e., timing and flexibility).
 6. Require each party to a sub-agreement to take the affirmative steps outlined in items one through five of this section.
4. The following additional forms must be included in the bid package. Under 40 CFR 33.302 (f) the Prime Contractor is responsible for the following forms:

EPA Form 6100-2 DBE Subcontractor Participation Form

The Prime Contractor will provide this form, along with the instruction page, to all of its DBE subcontractors.

EPA Form 6100-2 gives the DBE subcontractor the chance to describe the work the DBE subcontractor received from the Prime Contractor, how much the DBE subcontractor was paid and any other concerns the DBE subcontractor might have (for example reasons why the DBE subcontractor believes it was terminated by the Prime Contractor).

DBE subcontractors may send completed copies of EPA Form 6100–2 directly to the EPA Region 5 DBE Coordinator:

Ms. Adrienne M. Callahan, Small Business Coordinator
U.S.EPA, Region 5 Acquisition and Assistance Branch
77 West Jackson Boulevard (MC-10J)
Chicago, Illinois 60604
Phone: 312-353-5556 & email: Callahan.adrienne@epa.gov

EPA Form 6100–3 *DBE Subcontractor Performance Form*

The Prime Contractor will provide this form, along with the instruction page, to all of its DBE subcontractors.

EPA Form 6100-3 gives the DBE subcontractor the chance to report the scope and cost of the subcontract it received, providing a check for the information that the Prime Contractor put in EPA Form 6100-4.

The proposed DBE subcontractor shall forward a completed copy of the form to the Prime Contractor along with the subcontractor's quote. The Prime Contractor will include all completed 6100-3 forms as part of the Prime Contractor's bid or proposal package.

EPA Form 6100-4 Subcontractor *Utilization Form*

This form captures the Prime Contractor's intended use of an identified DBE Subcontractor, and the estimated dollar amount of the subcontract.

Each Prime Contractor shall complete this form.

1. List each subcontract discipline you will consider subcontracting – regardless of whether a subcontractor is already chosen. If you will not subcontract, mark form "N/A."
2. The Prime Contractor shall provide this form to the loan recipient within 10 days of bid opening.
3. The loan recipient shall provide this form, completed by the Prime Contractor, to the State Revolving Loan Fund Program within 14 days of bid opening
4. Use additional sheets as necessary.
5. The "US citizen?" question is required because, under 40 CFR 33.202, USEPA tracks DBE participation only for firms owned by citizens of the United States of America. Show whether the referenced DBE firm's owner is a citizen of the United States.

How Do I Get Certified As A DBE?

In order to be counted as a MBE/WBE under the new EPA DBE rule, MBE/WBEs must be certified by a federal agency (e.g., EPA, Small Business Administration, Department of Transportation) or by a State, locality, Indian Tribe, or independent private organization that meets the certification requirements of the new EPA DBE rule. Under the new EPA DBE rule an individual claiming economic disadvantaged status must have an initial and continued personal net worth of less than \$750,000.

MBE/WBE certifications under the Indiana Department of Administration (IDOA) no longer meet the requirements of the new EPA DBE rule. Firms interested in bidding on SRF funded projects must now seek certification through the Indiana Department of Transportation (INDOT). If INDOT is unable to certify the entity then the entity should seek certification through EPA.

Applications for certification under INDOT can be found at: <http://www.in.gov/indot/div/legal/dbe> under Certification Resources. If you have questions regarding the INDOT certification process contact Lakisha Riley, the INDOT Certification Coordinator, at 317-232-5089.

Applications for certification by EPA can be found on EPA's Small Business Programs website at <http://www.epa.gov/osbp/grants.htm> under Certification Forms. If you have questions regarding EPA's certification process contact Kimberly Patrick at 202-566-2605.

If you have any questions regarding this correspondence, please contact Doris Roberson at phone: 317-234-1266 or email: droberso@ifa.in.gov.